> (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days, compensation at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(k).

## STATEMENT OF THE CASE

### A. "Dual function" firefighter/paramedics sue the City of Los Angeles arguing they do not qualify as fire protection employees subject to the FLSA's partial overtime exemption when they are assigned to paramedic ambulances.

In this action, 119 dual function firefighter/paramedics sued to recover millions in unpaid overtime and liquidated damages from the City of Los Angeles, which employs them in the City's fire department. App. 4, 13, 21. In order to maximize its emergency response capabilities, the City has trained these personnel in both firefighting and paramedic skills to better serve the public. Court of Appeal Appellant's Excerpts of Record (ER) 171-72.

The City assigns its dual function personnel to staff either fire suppression vehicles or paramedic ambulances. Depending on the emergency service needs of the public, the dual function personnel may transfer from one vehicle to another, even during the course of a single shift. ER

126-27. When assigned to firefighting vehicles, they respond to fire-related emergencies. *See* ER 47-48. When assigned to paramedic ambulances, they respond primarily to medical emergencies, but also to fire scenes where they provide medical services and serve as back-up firefighters. ER 8, 9, 179-80.

Regardless of their assignment, dual function personnel work platoon duty schedules (alongside their "single function" firefighter colleagues) under which they work nine 24-hour shifts in a 27-day deployment period, for a total of 216 hours. ER 7. The City regularly pays overtime to these dual function personnel for all hours in excess of 204 in accordance with the FLSA's special overtime pay schedule for "employees engaged in fire protection ... activities." 29 U.S.C. § 207(k); ER 7.

The plaintiffs agreed the City properly compensates them while they are assigned to firefighting vehicles. ER 9. However, they asserted that, while they are assigned to paramedic ambulances, they do not qualify as fire protection employees and should therefore receive overtime for work hours over forty per week. ER 13.

### B. The Department of Labor regulations defining fire protection employees result in conflicting decisions as to when paramedics are subject to the partial overtime exemption.

When plaintiffs filed this action, the FLSA did not define who qualified as a fire protection employee within the meaning of the partial overtime exemption. *See* 29 U.S.C. § 207(k). To implement the exemption, the Department of Labor (DOL) issued regulations specifying the criteria for determining which employees – including

paramedics – qualified as fire protection employees. *See* 29 C.F.R. § 553.210(a) (2004); 29 C.F.R. § 553.215(a) (2004). The regulations also provided that the partial overtime exemption would not apply if the employees devoted more than twenty percent of their time to activities unrelated to exempt activity. 29 C.F.R. § 553.212(a) (2004).

The regulations, however, were confusing and difficult to decipher. *See Alex v. City of Chicago*, 29 F.3d 1235, 1241 (7th Cir. 1994) (regulations reflected "inartful draftsmanship" and "could have been set out less clumsily"). As a result, courts issued conflicting decisions struggling to interpret them to determine which paramedics and what paramedic work fell within the partial overtime exemption.

For example, although there was no dispute that some paramedics may qualify as fire protection employees, the courts disagreed as to the test for determining which fire department paramedics fell within the partial overtime exemption. *See Vela v. City of Houston*, 276 F.3d 659, 669 (5th Cir. 2001) (stating applicable test is a "point of contention among circuit courts"); *Alex*, 29 F.3d at 1240-41 (noting circuit split); *Justice v. Metro. Gov't of Nashville*, 4 F.3d 1387, 1394-95 (6th Cir. 1993) (noting confusion and inter-circuit conflict).[1]

[1] The Fifth, Sixth, and Seventh Circuits held that the two-prong test of 29 C.F.R. § 553.215 applied. *Vela*, 276 F.3d at 668-69; *Alex*, 29 F.3d at 1240-42; *Justice*, 4 F.3d at 1394-97; *Bond v. City of Jackson*, 939 F.2d 285, 287-88 (5th Cir. 1991); *see also Littlefield v. Town of Old Orchard Beach*, 780 F. Supp. 64, 67-68 (D. Me. 1992). One district court held that the four-prong test of 29 C.F.R. § 553.210 applied. *Nalley v. Mayor & City Council of Baltimore*, 796 F. Supp. 194, 198-99 (D. Md. 1992). The Eighth Circuit held that either test may be applied. *Lang v.*

(Continued on following page)

The courts also disagreed on the question whether responding to non-fire scenes and providing emergency medical services was "exempt" work counting toward the partial overtime exemption, or "nonexempt" work the performance of which might disqualify an employee from the partial overtime exemption. *See Christian v. City of Gladstone*, 108 F.3d at 933 (noting that courts have used different approaches); *see also Wouters v. Martin County*, 9 F.3d 924, 932 (11th Cir. 1993) (noting that categorization "is challenging").[2]

In the midst of the confusion, courts split on the question whether dual function firefighter/paramedics who respond primarily to non-fire medical emergencies qualify as fire protection employees. The Eighth Circuit held they do. *Lang*, 186 F.3d at 1038-39; *Christian*, 108 F.3d at 934-35; *see also Prickett v. DeKalb County*, 92 F. Supp.2d 1357,

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*City of Omaha*, 186 F.3d 1035, 1037-38 (8th Cir. 1999); *Christian v. City of Gladstone*, 108 F.3d 929, 932 n.2 (8th Cir. 1997). And the Fourth Circuit suggested that the test of neither of the regulation sections applied and instead courts must analyze the interrelated nature of paramedic and firefighter work to determine if a paramedic qualified as a fire protection employee. *West v. Anne Arundel County*, 137 F.3d 752, 760-61 (4th Cir. 1998).

[2] The Eighth Circuit held that the work of paramedics at non-fire scenes is "exempt." *Christian*, 108 F.3d at 934; *Lang*, 186 F.3d at 1039. The Fourth Circuit held it is exempt if fire and medical services are integrated, *Adams v. City of Norfolk*, 274 F.3d 148, 153-54 (4th Cir. 2001), but is otherwise nonexempt, *West v. Anne Arundel County*, 137 F.3d at 761. One Eleventh Circuit case held such work is only exempt if performed by dual function, not single function, paramedics. *Falken v. Glynn County*, 197 F.3d 1341, 1348, 1349-51 (11th Cir. 1999). Two other Eleventh Circuit cases held that responding to medical emergency calls is nonexempt. *O'Neal v. Barrow County Bd. of Comm'rs*, 980 F.2d 674, 681 (11th Cir. 1993); *Wouters v. Martin County*, 9 F.3d 924, 932 (11th Cir. 1993); *see also Nalley v. Mayor and City Council of Baltimore*, 796 F. Supp. at 200.

1365-69. The Fifth Circuit held they do not. *Vela*, 276 F.3d at 668-72. And the Fourth Circuit held they do where their fire and medical duties are integrated, *Adams*, 274 F.3d at 153-55, but not where they are "generally prohibited from active participation in fire suppression in order to keep clean for their medical duties," *West v. Anne Arundel County*, 137 F.3d at 757, 761.

### C. While this action is pending, Congress adds § 203(y) to the FLSA to clarify that the partial overtime exemption applies to dual function firefighter/paramedics who respond to medical emergencies.

In 1999, while this action was pending, Congress attempted to eliminate the confusion that had arisen under the DOL regulations and to rectify some courts' improper categorization of medical emergency activity as nonexempt. Specifically, Congress added a definition of fire protection employee to the FLSA to clarify that it includes dual function firefighter/paramedics and that exempt work includes medical emergency calls. 29 U.S.C. § 203(y).[3]

In 29 U.S.C. § 203(y), Congress defined "'[e]mployee in fire protection activities'" to include public agency firefighters and paramedics who (1) are "trained in fire suppression" and have the "legal authority and responsibility to engage in fire suppression," and (2) are engaged in either "the prevention, control, and extinguishment of fires *or* response to emergency situations where life, property,

[3] *See* pages 13-15, *post* (discussing and quoting portion of the legislative history for § 203(y)).

or the environment is at risk." 29 U.S.C. § 203(y) (emphasis added).

### D. The Ninth Circuit holds plaintiffs do not qualify as fire protection employees on the grounds they do not have the "responsibility" to fight fires.

The district court in this case, pursuant to its jurisdiction under 28 U.S.C. § 1337(a) and 29 U.S.C. § 216(b), held after a bench trial that plaintiffs did not qualify as fire protection employees while assigned to paramedic ambulances. App. 31, 33, 34; *see* App. 25. The City appealed.

The appeal proceeded on undisputed facts. Because plaintiffs conceded they met all of the other criteria of § 203(y), the appeal centered on the issue whether plaintiffs had the "responsibility" to engage in fire suppression within the meaning of § 203(y). *See* App. 16.

The City argued that fire suppression work is one of plaintiffs' job responsibilities, relying upon the following undisputed facts (which the Ninth Circuit did not address in its decision):

Because non-fire emergencies make up the vast majority of calls the City's fire department receives, when plaintiffs are assigned to paramedic ambulances they respond primarily to medical emergencies. ER 9, 179-80, 253-62. However, unlike the "single function" paramedics with whom the dual function firefighter/paramedics may work, plaintiffs serve as a back-up firefighting resource when they report to fire scenes. ER 8, 9, 179-80. They must be prepared to engage in firefighting by carrying on their ambulance their turnout clothing and individually-molded

face plates which are used with extra oxygen tanks stored on firefighting vehicles. ER 58, 68-69, 80, 121-22, 181, 193. They wear different-colored helmets than single function paramedics so Incident Commanders at fire scenes can quickly assess the fire suppression resources available. ER 67-68, 92, 120-21, 153, 192-93.

Moreover, dual function personnel are expected to volunteer their firefighting skills when appropriate – for example, where they see an immediate need to save a life. ER 144-45; *see* ER 201. They must serve as Incident Commander at fire scenes when they are first to arrive. ER 65, 159. And they must obey orders from Incident Commanders to undertake fire suppression duties, or face disciplinary action. ER 123-24.

Nevertheless, the Ninth Circuit held that plaintiffs did not have the "responsibility" to fight fires when assigned to paramedic ambulances because they respond primarily to non-fire medical emergencies and the record did not reveal that any of the plaintiffs had actually fought a fire while so assigned.[4] App. 18-19. The court held that plaintiffs are not subject to the partial overtime exemption for fire protection employees and therefore the City must pay more than $5.1 million in liquidated damages and overtime back pay for hours plaintiffs worked in excess of forty per week. *See* App. 13, 20.

[4] The court held its conclusion applied regardless whether the definition of fire protection employee in the DOL regulations or § 203(y) governed, and did not address the City's argument that § 203(y) alone applied to this action. App. 19-20.

## REASONS FOR GRANTING THE WRIT

### SUMMARY OF REASONS

This Court's intervention is urgently needed because the Ninth Circuit's decision effectively nullifies § 203(y) and defeats the very reason it was enacted – to include dual function firefighter/paramedics within the partial overtime exemption for fire protection employees.

Unless this Court acts now, the decision will adversely affect the ability of local governments nationwide to most effectively provide emergency services in a flexible and cost-efficient manner. This will impair fire departments not only in their capacity as providers of local emergency services, but also in their capacity as first responders to disasters resulting from Homeland Security breaches. And it will hinder fire departments' ability to contribute personnel to recovery efforts in large-scale disasters outside their jurisdictions.

Intervention is also required to finally resolve the inter-circuit conflict on the repeatedly recurring question whether the time paramedics dedicate to medical emergencies falls within the partial overtime exemption. Although Congress attempted to resolve that conflict with § 203(y), the court's decision here proliferates nearly twenty years worth of debate and disagreement. The nation's local emergency service providers should no longer be forced to operate in a state of uncertainty. Certiorari should be granted.

## DISCUSSION

### I. The Ninth Circuit's decision cannot be reconciled with either the language or purpose of § 203(y).

#### A. The court's interpretation of "responsibility" renders part of § 203(y) meaningless.

To determine whether plaintiffs have the "responsibility" to engage in fire suppression within the meaning of 29 U.S.C. § 203(y), the Ninth Circuit extracted that word from the statute and examined it in isolation. App. 17-19.

The court quoted several dictionaries defining "responsibility" to mean, for example (1) a "'duty, obligation or burden,'" or (2) "'a thing that one is required to do as part of a job.'" App. 17. Similarly, the court identified "responsible" to mean (1) "expected or obliged to account (for something, to someone), answerable, accountable," or (2) "'one who has been delegated some duty or responsibility by one in authority and who is subject to penalty in case of default.'" App. 17.

The court declared that the meaning of "responsibility" was not "vague" or "unclear" and deemed it "imprudent" to consider the statute's legislative history. App. 18 n.11. The court then concluded, in essence, that plaintiffs do not have the "responsibility" to engage in fire suppression while assigned to paramedic ambulances because they had not actually been ordered to do so. App. 18-19.

The court's interpretation and application of "responsibility" cannot be reconciled with the plain, unambiguous language of § 203(y), properly considered in its entirety. The statute defines the term "'[e]mployee in fire protection activities'" to include firefighters and paramedics who are

engaged in either "the prevention control, and extinguishment of fires *or* response to emergency situations where life, property, or the environment is at risk." 29 U.S.C. § 203(y)(2) (emphasis added). By using the disjunctive "or," the statute establishes two separate categories of exempt work. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-39 (1979). Congress would not have used "or" if it intended the meaning the Ninth Circuit applied here. If Congress had intended to require that fire protection employees must *actually* engage in fire suppression *and* paramedic work to qualify for the overtime exemption, Congress would have said so by, for example, using the conjunctive "and" instead of "or."

Indeed, interpreting "responsibility" to require the *actual* engagement in fire suppression renders the clause following the word "or" meaningless. *Kawaauhau v. Geiger*, 523 U.S. 57, 61-62 (1998) (declining to interpret one statutory term in a manner rendering another term superfluous).

At a minimum, Congress' use of the disjunctive "or" in § 203(y)(2) renders the term "responsibility" in § 203(y)(1) ambiguous and requires an examination of the legislative history to determine what Congress intended. Indeed, even if Congress had not used "or" in the statute, the dictionary definitions of "responsibility" cited by the Ninth Circuit are no less ambiguous than the term itself and demonstrate the need to consult legislative history. As explained below, by disregarding that history, the Ninth

Circuit reached a result directly contrary to the purpose of § 203(y).[5]

### B. By refusing to consider legislative history, the court issued a decision that defeats Congress' intent in enacting § 203(y).

As described above (pages 4-8, *ante*), Congress enacted § 203(y) against a backdrop of conflicting decisions under the DOL regulations attempting to define when paramedics qualify as fire protection employees. The legislative history reveals Congress believed that (1) dual function firefighter/paramedics fell within the partial overtime exemption; (2) time devoted to medical emergencies should

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[5] In any event, plaintiffs have "responsibility" to engage in fire suppression under the definitions invoked by the Ninth Circuit. They have a "'duty, obligation, [and] burden'" to serve as the Incident Commander when first to arrive at a fire scene and to engage in fire suppression on command, which they are "required," "'expected," and "obliged" to obey. *See* App. 17. If they fail to do so, they will be held "'answerable'" and "'accountable'" to their superiors and "'subject to penalty.'" *See* App. 17.

Furthermore, the facts relied on by the Ninth Circuit to conclude plaintiffs lack "responsibility" are incomplete or irrelevant. For example, when assigned to paramedic ambulances, plaintiffs must carry their turnout gear and individually-molded face plates for use with extra breathing apparatuses on firefighting engines in the event they are ordered to engage in fire suppression. ER 58, 68-69, 80, 121-22, 181, 193. The fact that paramedic ambulances are not equipped with fire-fighting equipment or breathing apparatuses and the fact that they do not wear their turnout gear while performing medical services is irrelevant since they would do so upon a command to engage in fire suppression. Moreover, at fire scenes, they wear different-colored helmets than single function paramedics so an Incident Commander can quickly assess available firefighting resources. ER 67-68, 92, 120-21, 153, 192-93. There would be no reason for this if plaintiffs did not have a responsibility to engage in fire suppression.

be considered "exempt;" (3) judicial decisions to the contrary had misinterpreted the FLSA and improperly cost public agencies millions of dollars in overtime pay; and (4) Congress needed to take action to eliminate the confusion that arose under the DOL regulations.

These points were stressed by the statute's original sponsor, Congressman Ehrlich. He explained the urgent need for § 203(y) and specifically criticized the decision in *West v. Anne Arundel County*, 137 F.3d 752, where the Fourth Circuit held that dual function firefighter paramedics did not qualify for the partial overtime exemption:

> [Section 203(y)] concerns fire department paramedics trained to fight fires who have prevailed in several suits for overtime compensation under the FLSA. The paramedics successfully argued they were not fire protection employees covered by the FLSA exemption since more than 20 percent of their normal shift time was spent engaged in emergency responses rather than firefighting, such as emergency medical calls.
>
> . . . For example, [in] Anne Arundel, Maryland, taxpayers are liable for $3.5 million under a recent FLSA case.
>
> The potential consequences of these cases are serious and far-reaching and could ultimately result in a dramatic increase in the local costs of fire protection to taxpayers nationwide.
>
> . . . .
>
> . . . This bill clarifies the law by more precisely defining those duties that should qualify for the firefighter exemption, thereby preserving the intended flexibility afforded to cities and fire departments under the original [FLSA].

145 Cong. Rec. H11500 (daily ed. Nov. 4, 1999) (statement of Rep. Ehrlich); *see Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) ("[A] statement of one of the legislation's sponsors . . . deserves to be accorded substantial weight in interpreting the statute.").

The then-Chairman of the House Committee on Education and the Work Force expressed the same points, noting that the statute would ensure that "cross trained" personnel are covered by the partial overtime exemption and would prevent the "needless[]" exposure of "local governments to significant financial liability." *A Bill to Amend the Fair Labor Standards Act of 1938 to Clarify the Overtime Exemption for Employees Engaged in Fire Protection Activities: Hearing on H.R. 1693 Before the H. Comm. on Education and the Workforce*, 106th Cong. (Nov. 3, 1999) (statement of Rep. Goodling, Chairman, H. Comm. on Education and the Workforce); *accord* 145 Cong. Rec. H11499-11500 (Nov. 4, 1999) (statement of Rep. Boehner); *see also* 145 Cong. Rec. E2343 (Nov. 10, 1999) (statement of Rep. Weldon, founder of the Congressional Fire and Emergency Services Caucus).

Congress' specific purpose in enacting § 203(y) was therefore to prevent decisions like the one the Ninth Circuit issued in this case. By refusing to consider the legislative history (and by failing to interpret "responsibility" in its context), the Ninth Circuit effectively nullified § 203(y). And, as the following section explains, the decision will reverberate in fire departments across the country.

## II. The Ninth Circuit's decision immediately and adversely affects the ability of local governments nationwide to provide emergency services to the public.

Over the years, the number of purely fire-related emergency calls has decreased as a result of fire prevention efforts, sprinkler systems, and stricter fire codes. At the same time, improvements in emergency medical technology have expanded, allowing emergency responders to provide a broader array of treatment on-site instead of providing merely ambulance transport.

To make the most efficient use of their fire department personnel, many cities nationwide staff their fire departments – at least in part – with dual function firefighter/paramedics who work platoon schedules. This staffing enhances the ability to quickly deliver fire and emergency services by providing maximum flexibility in the resources available for deployment. Such staffing has become increasingly necessary to the nation's Homeland Security and national emergency response efforts, as citizens rely upon their local emergency services as the first responders to emergencies such as terrorist attacks and natural disasters.[6]

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[6] As a recent report on emergency responders explains:

> America's local emergency responders will always be the first to confront a terrorist incident and will play the central role in managing its immediate consequences. Their efforts in the first minutes and hours following an attack will be critical to saving lives, reestablishing order, and preventing mass panic. . . . [E]mergency responders will respond to crises with whatever resources they have.

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Moreover, in major disasters, the increased life-saving capabilities of dual function personnel are critical. State and local governments must maintain coherent, integrated, and comprehensive emergency response capabilities to address not only the daily emergencies arising in their jurisdictions, but also catastrophes in other parts of the country. Through mutual aid agreements, fire department personnel regularly respond to emergencies outside of their own jurisdictions – for example, massive fires, natural disasters, hazardous materials incidents, and search and rescue operations. Training and staffing with dual function personnel better enables departments to assist with extra-territorial emergency response efforts while still providing adequate emergency services for the citizens these departments normally serve.

However, the Ninth Circuit's decision in this case retards these efforts by penalizing the use of dual function firefighter/paramedics. It discourages public agencies from efficiently and effectively allocating their limited resources. Indeed, the decision defeats the whole point of the fire protection employee overtime exemption – to shield state and local governments from the financial impact of the FLSA's forty-hour rule. H.R. Rep. No. 93-913, at 2838 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 2811, 2838.

The decision sustains the turmoil that reigned prior to the enactment of § 203(y). State and local governments understandably believed that § 203(y) resolved the confusion and conflict caused by the DOL regulations by including

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WARREN B. RUDMAN ET AL., EMERGENCY RESPONDERS: DRASTICALLY UNDERFUNDED, DANGEROUSLY UNPREPARED 11 (Council on Foreign Relations Press (2003)).

dual function personnel within the partial overtime exemption. The Ninth Circuit's decision casts serious doubt on local governments' ability to rely on § 203(y).

The decision's impact is immediate and nationwide. Because FLSA violations carry a liquidated damages penalty (29 U.S.C. § 216(b)), even those state and local governments outside the Ninth Circuit must heed its ruling. They cannot afford to gamble that their courts will properly interpret § 203(y) and effectuate Congress' intent.

State and local governments with dual function personnel working platoon schedules will now be forced to reevaluate their practices. They will be faced with three options – all of which have adverse consequences:

First, they can compensate their dual function personnel in accordance with the FLSA's forty-hour rule. This will result in tremendous additional payroll costs and unwieldy record keeping complications as the dual function employees transfer from one role to another to meet the public's emergency needs.

Second, they can eliminate dual function positions and segregate their emergency services. This will decrease emergency response capabilities and flexibility.

Third, they can eliminate platoon scheduling for dual function personnel and implement forty-hour work weeks. The increased shift changes, however, will disrupt emergency operations and, in some areas, will cause incongruous circumstances where the dual function personnel are working forty-hour weeks while their single function firefighter colleagues work platoon schedules.

Ultimately, it is the public that will suffer the adverse consequences flowing from the Ninth Circuit's decision –

either through increased taxes or deficiencies in the capabilities of local emergency response services. Only this Court can prevent that from happening.

## III. This Court's intervention is urgently needed to resolve the conflict on the recurring question whether paramedic work falls within the partial overtime exemption.

Although § 203(y) is a relatively new statute, the debate and disagreement concerning whether paramedics who respond primarily to medical emergencies qualify as fire protection employees has raged for nearly twenty years.

The struggle began after the DOL issued its regulations in 1987 implementing the fire protection employee partial overtime exemption. Since then, the question whether the response to medical emergencies excludes an employee from the exemption has been analyzed in at least seventeen published court decisions, and has been addressed by seven Circuit Courts of Appeals.[7] Moreover, the DOL has been asked numerous times to address the issue in formal letter rulings. *E.g.*, Admin. Ltr. Rul., Dept. of Labor, Wage & Hour Div. (Oct. 21, 1987), reprinted in Fair Labor Standards Handbook, App. III, pp. 99-100; Admin. Ltr. Rul., Dept. of Labor, Wage & Hour Div. (Dec. 24, 1991), reprinted in Fair Labor Standards Handbook, App. III, pp. 174-75; Admin. Ltr. Rul., Dept. of Labor, Wage

[7] In addition to this case and the cases cited at pages 5-7 and in footnotes 1 and 2, see *Roy v. County of Lexington*, 141 F.3d 533, 538-42 (4th Cir. 1998); *Spires v. Ben Hill County*, 980 F.2d 683, 687-89 (11th Cir. 1993); and *Horan v. King County*, 740 F. Supp. 1471, 1478-79 (W.D. Wa. 1990).

& Hour Div. (Jan. 9, 1992), reprinted in Fair Labor Standards Handbook, App. III, pp. 180-81; Admin. Ltr. Rul., Dept. of Labor, Wage & Hour Div. (Feb. 13, 1995), reprinted in Fair Labor Standards Handbook, App. III, pp. 217-18.

The Ninth Circuit's decision here joins the conflict that arose under the DOL regulations. By equating the term "responsibility" with the act of firefighting and ignoring the "or" clause in § 203(y)(2), the court effectively treated the plaintiffs' paramedic work as nonexempt, as did the Fourth Circuit in *West v. Anne Arundel County*, 137 F.3d at 761. *See also Vela*, 276 F.3d at 670-71 (dual function personnel who are not regularly dispatched to fires do not qualify for the partial overtime exemption). The Ninth Circuit's decision conflicts not only with the language of § 203(y)(2), but with the Eighth Circuit's decisions holding that the medical and back-up firefighting services of dual function personnel constitute exempt work qualifying for the partial overtime exemption.[8] *Lang*, 186 F.3d at 1039; *Christian*, 108 F.3d at 934;

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[8] *Lang* involved facts virtually identical to this action. As the Eighth Circuit there explained:

> "[S]tandby medical support is an activity which is required for and directly concerned with the control or extinguishment of fires . . . " Fighting fires is a dangerous, and at times, complex task. Simply because the division of labor and the development of specialties at a fire scene relegates the paramedics to a medical support function does not mean that they are any less directly concerned with the firefighting effort than the individual who runs into a burning building with a hose.
>
> . . . [Moreover,] [b]eing available as back-up firefighters certainly places plaintiffs in a status that directly concerns itself with the extinguishment of fires.

*Lang*, 186 F.3d at 1038-39.

*see also Adams*, 274 F.3d at 153-54 (paramedic work is exempt where fire and medical services are integrated).

Although Congress intended that § 203(y) would bring an end to the conflict and clarify that the response to medical emergencies falls within the partial overtime exemption (*see* pages 13-15, *ante*), this case and recent others show that the issue continues to arise and generate conflicting results. Indeed, another virtually identical case is currently pending before the Ninth Circuit. *Weaver v. City and County of San Francisco* (9th Cir. argued Dec. 9, 2005.) In *Weaver*, the district court applied § 203(y) and held that dual function personnel assigned to paramedic ambulances qualify for the partial overtime exemption. *Weaver v. City and County of San Francisco*, 2004 WL 422626 (N.D. Cal. 2004) (unreported). By contrast, a Texas district court applying § 203(y) concluded that a dual-trained fire department paramedic did not qualify for the exemption. *Chavez v. City of Katy*, 2005 WL 1657037 (S.D. Tex. 2005) (unreported). And the issue is presented in another action recently filed in Florida. *Diaz v. City of Plantation*, No. 05-60757-CIV (S.D. Fla. filed May 9, 2005).

The DOL also continues to receive requests to express its opinion concerning whether dual function fire-fighter/paramedics who respond primarily to medical emergencies qualify for the partial overtime exemption. In a September 9, 2005 opinion letter, the DOL concluded that they do. Ltr. Rul., Dept. of Labor, Wage & Hour Div., FLSA2005-10NA (Sept. 9, 2005).

The nation's fire suppression agencies need clarity and certainty in the law so they can carry out their essential public mission. They cannot determine how best to staff their emergency service agencies or how to allocate

their limited funds if they do not know what their compensation obligations are under the FLSA.

Congress attempted to provide certainty by enacting § 203(y), yet the Ninth Circuit all but disregarded the statute and issued a decision that intensifies the conflict. The decision amply demonstrates that there never will be uniformity in the law absent this Court's intervention to finally resolve whether paramedics' medical work disqualifies them from the partial overtime exemption. This Court should grant certiorari to provide state and local governments the legal clarity needed to redirect their attention from staffing and scheduling problems to saving property and lives.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

CEDRICK CLEVELAND; JUAN M. ACHAN; LUIS F. ALDANA; DENNIS M. ARCHIE; ANTHONY ARNADO; DENNIS BARNES; JENNIFER LYNN BOSCOE; JASON BRAFF; BRIAN T. BROOKS; JAIME L. BROWN; MICHAEL E. BROWN; JOSHUA L. BURTON; CHRISTOPHER LEE CARPENTER; ARMANDO CARRANZA; HEYWOOD CHENG; BRAXTON CLARK; PAUL W. CLARK; RUEL A. COLE; JUAN R. COLSON; RAYMOND R. CRAWFORD; JAMES D. CRITES; ARMANDO C. CUEVAS; DOUGLAS DILKS; JEFF M. DODD; DAN DRAGOTTO; BRIAN C. DUDLEY; WILLIAM A. DUNN; STEVE J. ENCINIAS; ANTHONY CHARLES FERRO; GUADALUPE G. FLORES; MARK WRAY FLOT; LARRY R. FORD; TIMOTHY P. FREEMAN; RAYMOND A. GALLEGOS; DANNY WILLIAM GARRETT; JAMES DAVID GIBSON; MARK GLENCHUR; JAMES R. GOLDSWORTHY; JEFFREY G. GONZALEZ; CHRISTIAN P. GRANUCCI; EDWARD J. GUTIERREZ; BENJAMIN R. GUZMAN; JOSEL GUZMAN; SIR R. HABERSHAM, IV; ANTHONY HARDAWAY; HUSTON HERMAN; ALFRED B. HERNANDEZ, III; RENE HERRERA; RICKY M.

No. 03-55505

D.C. No. CV-99-09175-CBM

OPINION

HERRERA; LARRY HOERNER; KORY WAYNE JACKSON; LARRY JACKSON; RODERIC A. JACKSON; RONNIE R. JIMENEZ; JAYSON A. JOHNSON; KEITH M. JOHNSON; KEVIN MALCOLM JOHNSON; DONALD R. JONES; GARABED KARAOGLANIAN; KENNETH L. KNIGHTEN; JOSEPH D. LANKAU; DALE A. LECESNE; ROBERT LEDESMA; BRIAN M. LEE; ROBERT W. MACINNES; DAVID MALAFRONTE; JOE G. MANZO; DEXTER G. MCDANIEL; MICHELLE MARIE MCKEE; TIMOTHY K. MCKEE; LAURINDA MEADE; JOSEPH MENTON; CHRISTOPHER J. MOFFATT; DONTA T. MONTGOMERY; CECIL MORRIS; ROGER D. MORRIS; CARL S. MOSKOVITZ, II; AARON G. MUNGARAY; ALAN C. NAEOLE; DONALD P. NASH, II; JAMES NORDQUIST; DENNIS A. OHLIGSHLAGER; DREW OLIPHANT; TYRONE O'SHEA; PATRICK T. OYAMA; ROY ALLEN PAIGE; DAVID PASS; NORMAN M. PATE; STEVEN KEITH PHILLIPS; BRANDI PILATO; WILLIAM RAMSEY; STEVEN G. RAVITZ; LOUIS D. RICHARD; DAVID T. RILES; JOHN RODRIGUEZ; MARK L. ROUSSEAU; BRENT RUFF SHANNON K. SAFFO; PAUL T. SEMERJIAN; RICHARD DWIGHT SENNEFF; GEORGE CARR SMITH, III; STANLEY E. SMITH; PAUL E. SORUM; BRENT SPANKROY; JOSEPH ST. GEORGE; THOMAS W. STAFFORD;

CAREY STEINER; DENNIS C. STONE; MICHAEL J. TAYLOR; MICHAEL D. TOBEY; ABEL J. TORRES; LOUIS TORRES; CATHERINE A. UTTERBACK; JOHN P. VIGIL; VICTOR M. VILLA; DONELL C. WIBLE; KENNETH WIGCHERT; ERIK D. WILLIAMS; MARK R. WOOLF,

*Plaintiffs-Appellees,*

v.

CITY OF LOS ANGELES, a Municipal corporation,

*Defendant-Appellant.*

Appeal from the United States District Court
for the Central Distict of California
Consuelo B. Marshall, Chief Judge, Presiding

Argued and Submitted
December 6, 2004 – Pasadena, California

Filed August 22, 2005

Before: James R. Browning, Harry Pregerson, and Marsha S. Berzon, Circuit Judges.

Opinion by Judge Pregerson

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## COUNSEL

Barry R. Levy (argued), and Karen M. Bray (briefed), Horvitz & Levy, Encino, California, for the defendant-appellant.

Alan S. Kaufman, Chamberlain, Kaufman & Jones, Albany, New York, for the plaintiffs-appellees.

## OPINION

PREGERSON, Circuit Judge:

This case involves the application of the Fair Labor Standards Act's ("FLSA") overtime exemption for an "employee engaged in fire protection activities." 29 U.S.C. § 207(k). Unless an exemption applies, the FLSA requires that employees be compensated at a rate of one-and-one-half times their regular hourly rate for all hours worked in excess of forty in one week. We must determine whether the fire protection exemption should be applied to dual function paramedics, individuals trained in both fire suppression and advanced life saving. This issue is of first impression in the Ninth Circuit.

We have jurisdiction under 28 U.S.C. § 1291. For the reasons set forth below, we affirm the district court, finding that no exemption applies.

### I. Factual Background

Plaintiffs are 119 employees of Defendant City of Los Angeles (the "City"). They are employed as "dual function" or "cross-trained" firefighters/paramedics ("dual function paramedics"). This means that Plaintiffs are fully trained and certified in both fire suppression skills *and* advanced life support paramedics. The City also employs "single function" paramedics who are *not* trained in fire suppression.

Plaintiffs work a rotating schedule that results in nine scheduled twenty-four-hour shifts every twenty-seven days, for a total of 216 hours per work period. During periods relevant to this case, Plaintiffs were assigned to

work as paramedics on "paramedic ambulances." While staffing paramedic ambulances, Plaintiffs were responsible for providing medical care, transporting patients to hospitals, maintaining the ambulances, and completing related paperwork. Paramedic ambulances are usually staffed by two employees. This may include two single function paramedics, two dual function paramedics, or one of each. Dual function and single function paramedics assigned to paramedic ambulances perform the same job – that is, they provide medical care and transport assistance.

Paramedic ambulances are not designed to provide fire protection services. They do not carry water, hoses, pumps, ladders, or fire suppression breathing equipment, nor do they carry any specialized extrication equipment, aside from a crow bar and a lock cutter. All personnel at a fire scene are expected to wear fire protection gear, except paramedics on paramedic ambulances, who are dispatched only to perform medical services. Paramedic ambulances are not dispatched to every fire call, but are instead dispatched only when there appears to be a need for advanced life support medical services. Further, when they arrive at fire scenes, paramedics treat injured people, standby for patient care, and take exhausted firefighters to the hospital; they do not assist with any fire suppression.

If there is no injury, and the incident commander does not see the need for the paramedic ambulance to stand by, the incident commander has the discretion to release the paramedic ambulance from the scene to be available for other calls.

Paramedic ambulances are rarely dispatched to fire scenes, so such dispatches make up a very small portion of

Plaintiffs' work. Plaintiffs testified that they are sent to fire scenes an average of one to two times per year, and only to perform medical functions. There is no evidence that any Plaintiff (or any other dual function paramedic) has ever been ordered to perform fire suppression by an incident commander when assigned to a paramedic ambulance. Dual function paramedics may volunteer to assist firefighters at a fire scene, but if they do not volunteer, they are not subject to discipline.

Plaintiffs assigned to paramedic ambulances do not perform environmental rescues;[1] such rescues are performed by fire suppression personnel assigned to vehicles with the necessary equipment. Plaintiffs are sometimes dispatched to crime scenes and vehicle accidents for the purpose of providing medical services. Nevertheless, Plaintiffs respond to a considerably greater number of purely medical emergencies than they do to fires, traffic accidents, or crime scenes. Because paramedics are called away from the fire station more frequently than firefighters, dual function paramedics often miss required fire suppression training sessions.

## II. Statutory and Regulatory Background

The Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §§ 201-19, provides for the payment of premium overtime compensation at one and one-half times the regular rate when an employee works more than forty

[1] Although the district court did not define "environmental rescues," it appears to refer to the swift water rescues, cliff rescues, and underground tunnel rescues discussed in the parties' testimony.

hours in a seven-day week. *See* 29 U.S.C. § 207(a).[2] Section 207(k) provides an exemption for law enforcement and fire protection employees. *See* 29 U.S.C. § 207(k).[3] Under this

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[2] Section 207(a) states, in pertinent part:

> Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions
>
> (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.
>
> (2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966 –

29 U.S.C. § 207(a).

[3] Section 207(k) states, in pertinent part:

> No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities . . . if –
>
> (1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(Continued on following page)

exemption, an employer must compensate fire protection employees with payment of premium overtime payment only after 204 hours of work within a twenty-seven-day period. *See* § 207(k)(2). The City has relied on § 207(k)'s exemption to pay Plaintiffs as employees in fire protection activities. Classified as such, Plaintiffs received overtime pay only if they worked more than 204 hours in a twenty seven-day work-period.

### *A. Regulatory Interpretation of the FLSA*

At the time that Plaintiffs filed their complaint, the FLSA did not define an "employee in . . . fire protection activity." Guidance for defining this term came from Department of Labor ("DOL") regulations, available in the Code of Federal Regulations. *See* 29 C.F.R. § 553. Section 553.210 provides a four-part test for determining whether an employee is engaged in a "fire protection activity." 29 C.F.R. § 553.210(a).[4] The last full sentence of this regulation

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(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(k).

[4] Section 553.210(a) states in pertinent part:

As used in [§ 207(k)], the term "any employee . . . in fire protection activities" refers to any employee (1) who is employed by an organized fire department or fire protection district; (2) who has been trained to the extent required by State statute or local ordinance; (3) who has the legal authority and

(Continued on following page)

specifically includes ambulance and rescue service workers who form an "integral part" of an agency's fire protection activities. This sentence is followed by an explicit cross-reference to 29 C.F.R. § 553.215. According to § 553.215, ambulance and rescue service employees "of a public agency *other* than a fire protection or law enforcement agency may be treated as employees engaged in fire protection" if they are "*regularly* dispatched to fires, crime scenes, riots, natural disasters and accidents." 29 C.F.R. § 553.215(a) (emphasis added).[5] Section 553.212 provides

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*responsibility to engage in the prevention, control or extinguishment* of a fire of any type; and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental non-firefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards. The term would include all such employees, regardless of their status as "trainee," "probationary," or "permanent," or of their particular specialty or job title. . . . *The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See* § 553.215.

29 C.F.R. § 553.210(a) (emphasis added).

[5] Section 553.215(a) states in pertinent part:

Ambulance and rescue service employees of a public agency *other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection or law enforcement activities of the type contemplated by [§ 207(k)] if their services are substantially related to firefighting* or law enforcement activities in that (1) the ambulance and rescue service employees have received training in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel injured in the performance of their respective, duties, and (2) the ambulance and rescue service employees are *regularly dispatched to fires, crime scenes, riots, natural disasters and accidents.* As provided in § 553.213(b), where employees perform both fire protection

(Continued on following page)

that someone who spends more than twenty percent of his or her working time engaged in nonexempt activities (activities not related to fire suppression) may not be considered an "employee engaged in fire protection." 29 C.F.R. § 553.212(a).[6]

## III. Procedural Background

### *A. District Court Proceedings*

#### 1. *The Complaint*

In their complaint, Plaintiffs alleged that the City violated the FLSA by compensating them as fire protection employees under 29 U.S.C. § 207(k)'s special overtime exemption during the periods that they were assigned to paramedic ambulances. Plaintiffs contend that during those periods, they did not qualify as fire protection employees as that term was defined by DOL regulations

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and law enforcement activities, the *applicable standard is the one which applies to the activity in which the employee spends the majority of work time during the work period.*

29 C.F.R. § 553.215(a) (emphasis added).

[6] Section 553.212(a) states in pertinent part:

Employees engaged in fire protection . . . activities as described in § 553.210 . . . may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their fire protection or law enforcement activities. . . . The performance of such nonexempt work will not defeat [the § 207(k)] exemption unless it exceeds 20 percent of the total hours worked by that employee during the workweek or applicable work period. *A person who spends more than 20 percent of his/her working time in nonexempt activities is not considered to be an employee engaged in fire protection or law enforcement activities for purposes of this part.*

29 C.F.R. § 553.212(a) (emphasis added).

set forth in 29 C.F.R. § 553, and that they should have been compensated at a rate of one-and-one-half times their regular hourly rate for all hours in excess of forty hours worked in one week.

Specifically, Plaintiffs asserted that they do not qualify as fire protection employees under the DOL regulations because: (1) they do not have the "responsibility" to engage in fire suppression, § 553.210(a)(3); (2) they do not, in fact, engage in fire suppression and are not regularly dispatched to fire scenes, § 553.210(a); and (3) the exemption is inapplicable because Plaintiffs spent more than twenty percent of their time engaged in nonexempt work (work that is not performed incident to or in conjunction with their fire protection) because they devote the vast majority of their time to providing medical services, § 553.212(a). Plaintiffs also alleged that the City's decision to compensate them as fire protection employees was not the result of a good faith effort to comply with the FLSA.

### 2. *Enactment of 29 U.S.C. § 203(y)*

On December 9, 1999, three months after Plaintiffs filed their complaint, Congress enacted 29 U.S.C. § 203(y).[7] Section 203(y) provides the FLSA with its own statutory definition of an "employee in fire protection activities." 29 U.S.C. § 203(y). This definition is much shorter and simpler than the piecemeal definition found in the Code of Federal Regulations. Nonetheless, § 203(y) is reminiscent of 29 C.F.R. § 553.210(a)(3), inasmuch as it defines an employee in fire protection activities as one who "has the

[7] *See* Fair Labor Standards Act Amendment, Pub. L. 106-151, 113 Stat. 1731 (1999).

legal authority and *responsibility* to engage in fire suppression. . . ." 29 U.S.C. § 203(y)(1) (emphasis added).[8]

### 3. *District Court Ruling*

The parties stipulated to a bifurcated bench trial. The issue of liability was tried first, with the amount of damages to be determined later. Without affording priority to the definitions of "employee in fire protection activities" as set forth in the DOL regulations and in § 203(y), the district court concluded that Plaintiffs did not qualify as "employee[s] in fire protection activities" under *either* definition because: (1) Plaintiffs do not have the "responsibility to engage in fire prevention, control or extinguishment" as set forth in 29 C.F.R. § 553.210(a)(3); (2) Plaintiffs are not regularly dispatched to fire scenes as described by 29 C.F.R. § 553.215(a)(2); (3) Plaintiffs' nonexempt work is not limited to less than twenty percent of their total work hours as described by 29 C.F.R. § 553.212; and (4) Plaintiffs do not have the "responsibility

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[8] Section 203(y) states, in pertinent part:

> "Employee in fire protection activities" means an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who –
>
> (1) is trained in fire suppression, has the legal authority and *responsibility to engage in fire suppression,* and is employed by a fire department of a municipality, county, fire district, or State; and
>
> (2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

29 U.S.C. § 203(y) (emphasis added).

to engage in fire suppression" as set forth in 29 U.S.C. § 203(y).

Following the liability phase of the trial, the parties stipulated to a method for calculating the unpaid overtime. The district court concluded that Plaintiffs were entitled to liquidated damages, because the City did not act reasonably or in good faith. The district court subsequently entered judgment, awarding unpaid overtime and liquidated damages for a total of $5,131,514.02. The district court also awarded Plaintiffs $116,550.00 in attorneys fees and $11,389.12 in costs.

### *B. The Appeal*

The City maintains that all work performed by Plaintiffs, including emergency medical services, is exempt under § 203(y).[9] In addition, the City contends that § 203(y) amended the FLSA to both define and *clarify* the scope of exempt activity under § 207(k)'s fire protection employee exemption. As a clarification, the City asserts that § 203(y) applies both retroactively and prospectively, and that § 203(y) should govern the district court's entire analysis. *See ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 689 (9th Cir. 2000) (recognizing that "clarifying legislation is not subject to any presumption against retroactivity and is applied to all cases pending as of the date of its enactment").

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[9] The City's appeal focuses only on the times Plaintiffs were assigned to paramedic ambulances because: (1) Plaintiffs concede that they were properly compensated under the fire protection employee exemption during the periods they staffed firefighting vehicles; and (2) the City concedes that Plaintiffs should not be compensated as fire protection employees during the periods they work as Quality Improvement Analysts.

Plaintiffs maintain that the district court correctly applied and interpreted the FLSA, its recent amendment, and relevant DOL regulations.

## IV. Standard of Review

A district court's determinations regarding exemptions to the FLSA are questions of law that we review *de novo*. *See Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1124 (9th Cir. 2002). However, findings of fact underlying a legal determination are reviewed for clear error. *See id.*

The district court's interpretation of DOL regulations promulgated under the FLSA is reviewed *de novo*. *See Webster v. Pub. Sch. Employees of Wash., Inc.* 247 F.3d 910, 914-15 (9th Cir. 2001). Nonetheless, deference is owed to the DOL's regulations interpreting the Act. *See Baldwin v. Trailer Inns, Inc.*, 266 F.3d 1104, 1112 n.4 (9th Cir. 2001).

## V. Discussion

The FLSA is construed liberally in favor of employees; exemptions "are to be narrowly construed against the employers seeking to assert them. . . ." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *see also Klem v. County of Santa Clara*, 208 F.3d 1085, 1089 (9th Cir. 2000) (holding that the FLSA "is to be liberally construed to apply to the furthest reaches consistent with Congressional direction") (quotation and citation omitted). Further, an FLSA exemption will not be found "except [in contexts] plainly and unmistakably within [the given exemption's] terms and spirit." *Id.* (quoting *Arnold*, 361 U.S. at 392). Therefore, the City has the burden to prove that Plaintiffs meet each element of the § 207(k) exemption for "employee[s] in fire

protection activities" and that Plaintiffs fit "plainly and unmistakably" within the terms and spirit of the exemption.

As discussed in greater detail below, the district court properly concluded that the City did not meet its burden of proving that Plaintiffs qualify as "employees engaged in fire protection" as defined by the DOL's regulations *or* § 203(y). Each definition will be examined in turn.

### *A. The Definitions of "Employee Engaged in Fire Protection Activities," and Their Applications*

#### *1. 29 C.F.R. § 553.210 and 29 U.S.C. § 203(y)*

Section 553.210(a) defines an "employee . . . in fire protection activities" as any employee who: (1) is employed by an organized fire department or fire protection district; (2) has been trained in fire protection; (3) has the legal authority and *responsibility* to engage in the prevention, control, or extinguishment of a fire; and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires.[10] 29 C.F.R. § 553.210(a) (emphasis added). Section 203(y) states that an "employee in fire protection activities" is one who: (1) is trained in fire suppression; (2) has the legal authority and *responsibility* to engage in fire suppression;

[10] Section 553.210(a) alternatively provides that § 207(k) also applies to "rescue and ambulance service personnel if such personnel form an integral party of the public agency's fire protection activities. *See* § 553.215." This alternative exemption cannot apply to the Plaintiffs because they are employed by the Los Angeles City Fire Department, and § 553.215 only applies to "employees of a public agency *other* than a fire protection . . . agency." § 553.215(a).

(3) is employed by a fire department of a municipality, county, fire district, or State; and (4) is either engaged in the prevention, control, and extinguishment of fires or responds to emergency situations where life, property, or the environment is at risk. 29 U.S.C. § 203(y) (emphasis added). The parties agree that this case turns on whether Plaintiffs have the *responsibility* to engage in fire prevention as required by 29 C.F.R. § 553.210(a)(3) and 29 U.S.C. § 203(y)(2).

To determine the meaning of a term in a federal regulation, we look to the common meaning of the word. *See United States v. Willfong,* 274 F.3d 1297, 1301 (9th Cir. 2001) (citing *United States v. Hoff,* 22 F.3d 222, 223 (9th Cir. 1994)). The starting point for an examination of statutory meaning is the text of the statute itself. *See United States v. Sioux,* 362 F.3d 1241, 1246 (9th Cir. 2004). Where "the statute's language is plain, the sole function of the courts is to enforce it according to its terms," *United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 241 (1989) (citation and internal quotations omitted), because "courts must presume that a legislature says in a statute what it means and means in a statute what it says there," *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992). The inquiry must cease if the statutory language is unambiguous and "the statutory scheme is coherent and consistent." *Ron Pair Enters.,* 489 U.S. at 240. "When a statute does not define a term, a court should construe that term in accordance with its 'ordinary, contemporary, common meaning.'" *San Jose Christian Coll. v. City of Morgan Hill,* 360 F.3d 1024, 1034 (9th Cir. 2004) (internal citation omitted). "To determine the 'plain meaning' of a term undefined by a statute, resort to a dictionary is permissible." *Id.* at 1034.

The ordinary, common meaning of the word "responsibility" is "a duty, obligation or burden." American Heritage Dictionary of the English Language, Fourth Edition (Houghton Mifflin 2000). Other dictionaries are to the same effect:

- "A charge, trust, or duty, for which one is responsible," Oxford English Dictionary (2nd ed.1989);
- "Liability," Black's Law Dictionary (8th ed.2004);
- "A thing or person that one is responsible for," Webster's New World Dictionary, Third College Edition (1986).

Similarly, "responsible" means "expected or obliged to account (for something, to someone), answerable, accountable" and "involving accountability, obligation or duties." Webster's New World Dictionary, Third College Edition (1986). "Responsible applies to one who has been delegated some duty or responsibility by one in authority and who is subject to penalty in case of default." *Id.* "The state or fact of having a duty to deal with something [is] . . . a thing that one is required to do as part of a job, role or legal obligation." New Oxford American Dictionary (2001). "Responsible" means "having an obligation to do something, or having control over or care for someone, as part of one's job or role." *Id.*[11]

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[11] The City devotes extensive briefing to the possible legislative intent behind enacting § 203(y). The City contends, that in enacting § 203(y), Congress meant to ensure that the definition applied to dual function paramedics as well as firefighters. The City cites numerous congressional statements to support its contention that § 203(y) was

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Applying this ordinary, common-sense meaning, for Plaintiffs to have the "responsibility" to engage in fire suppression, they must have some real obligation or duty to do so. If a fire occurs, it must be their job to deal with it. The undisputed evidence shows that, among other things:

(1) the paramedic ambulances do not carry fire-fighting equipment or breathing apparatuses;

(2) a dispatcher does not know if he or she is sending single or dual function paramedics to a call;

(3) paramedic ambulances are not regularly dispatched to fire scenes and are dispatched

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intended to include dual function paramedics. *See* 145 Cong. Rec. E2343, H11499, and H2809.

According to the rules of statutory construction, the court can only look to legislative intent when a statute is ambiguous. *See HUD v. Rucker*, 535 U.S. 125, 132 (2002) ("[R]eference to legislative history is inappropriate when the text of the statute is unambiguous."); *see also W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-99 (1991)

> (The best evidence of [legislative] purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous – that has a clearly accepted meaning in both legislative and judicial practice – we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.).

However, because the term "responsibility" is not vague or unclear on these facts, the statute cannot be deemed ambiguous, and review of legislative history would be imprudent. *See Int'l Ass'n of Machinists & Aerospace Workers, Local Lodge 964 v. BF Goodrich Aerospace Aerostructures Group*, 387 F.3d 1046, 1051-52 (9th Cir. 2004) ("Only if this organic approach leaves ambiguity – or, indeed, if it reveals it – may we turn to extrinsic indicia of legislative intent, like legislative history.")

only when there appears to be a need for advanced life support medical services;

(4) dual function paramedics are not expected to wear fire protective gear;

(5) dual function paramedics are dispatched to a variety of incidents (e.g., vehicle accidents and crime scenes) at which they are expected to perform only medical services; and

(6) there is no evidence that a dual function paramedic has ever been ordered to perform fire suppression.

For these many reasons, the district court properly concluded that the City did not meet its burden of showing that Plaintiffs have the "responsibility" to engage in fire prevention, control, or extinguishment as required by 29 C.F.R. § 553.210(a)(3).

### 2. *29 C.F.R. § 553.212*

Section 553.212 provides that an employee who spends more than twenty percent of his or her working time engaged in nonexempt activities may not be considered an "employee engaged in fire protection." 29 C.F.R. § 553.212(a). According to § 553.212, if ambulance or rescue service workers fall within §§ 553.210 or 553.215, they are still entitled to § 207(a)'s regular overtime compensation so long as they spend more than twenty percent of their working time involved in nonfire suppression activities. Because Plaintiffs do not fall within the definition of either § 553.210 or § 553.215, we need not decide whether they spend more than twenty percent of their working time in nonexempt activities. *See Vela v. City of Houston*, 276 F.3d 659, 672 (5th Cir. 2001).

### *B. The Temporal Scope of 29 U.S.C. § 203(y)*

As discussed above, when Plaintiffs filed their complaint, the FLSA did not contain a definition for an "employee in fire protection activities," and Plaintiffs' suit was based on the contention that they did not fit within the DOL's definition in 29 C.F.R. § 553. In December 1999, Congress enacted 29 U.S.C. § 203(y), which provided the FLSA with its own definition. The City contends that the definition of § 203(y) supercedes any DOL language as the exclusive definition. Further, the City contends that this definition should be applied retroactively and prospectively because Congress' enactment of § 203(y) constitutes a "clarification" rather than an amendment. However, because Plaintiffs do not have the "responsibility" to engage in fire suppression and, consequently do not qualify under *either* definition, there is no need to discuss the temporal scope of § 203(y).

## VI. Conclusion

Because the City has not met its burden of proving that Plaintiffs qualify as "employees engaged in fire protection" as defined by *either* 29 C.F.R. § 553 *or* 29 U.S.C. § 203(y), the district court's finding that § 207(k)'s exemption does not apply is AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| CEDRICK CLEVELAND, et al., Plaintiffs, v. CITY OF LOS ANGELES, Defendant. | CASE NO. CV 99-9175-CBM (SJHx) FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed Jul. 3, 2002) |

## FINDINGS OF FACT

1. Plaintiffs are employees of the Defendant. They work at the Los Angeles City Fire Department.

2. Plaintiffs are "dual function" or "cross-trained" firefighters/paramedics (hereinafter "dual function paramedics"). This means they are fully trained and certified in fire suppression skills and also fully trained and certified as paramedics.

3. Fully trained and certified paramedics who are not also fully trained in fire suppression skills are known as "single function" paramedics.

4. Plaintiffs have each executed and filed with the Court their respective consents in writing to become a party plaintiff in this action.

5. Defendant has paid plaintiffs as employees in fire protection activities as the phrase is used in 29 USC §207(k). As such, plaintiffs receive overtime pay only if and when they work more than 204 hours in a 27 day work period.

6. Each plaintiff has worked more than 40 hours per week on at least one occasion during times pertinent to this case.

7. Within the Fire Department there are vehicles known as paramedic ambulances or rescue ambulances, which will hereafter be called "paramedic ambulances."

8. The paramedic ambulances are staffed around the clock in 24 hour shifts.

9. Plaintiffs work a rotating schedule that results in 9 scheduled 24 hours shifts every 27 days.

10. Paramedic ambulances are usually staffed by two employees. These may be single function paramedics, dual function paramedics, or a combination of the two.

11. During some periods pertinent to this case, each of the plaintiffs who are not captains has been regularly assigned to work on a paramedic ambulance.

12. When plaintiffs work on paramedic ambulances, they are "ambulance and rescue personnel" as this phrase is used in 29 CFR §553.210(a) and 29 CFR §553.211(b).

13. No hoses, pumps or ladders are carried on paramedic ambulances.

14. No specialized extrication equipment is carried on paramedic ambulances; paramedic ambulances carry a crow bar and a lock cutter.

15. Paramedic ambulances do not carry breathers.

16. The dispatcher does not know the training of the paramedics being dispatched to an emergency.

17. The particular paramedic ambulance dispatched is a function of availability and location.

18. The Fire Department has a shortage of paramedics.

19. Paramedic ambulances are not sent to every fire call.

20. Paramedic ambulances are dispatched to calls by dispatchers when there appears to be a need for advanced life support medical services.

21. Paramedic ambulances and the dual or single function paramedics working on them are dispatched to provide medical care, not to perform fire suppression.

22. Testimony of dual function paramedic plaintiffs indicated that they are sent to fire scenes an average of one to two times per year, and only to perform medical functions.

23. When they arrive at fire scenes, dual function paramedics treat injured people, standby for patient care and take exhausted firefighters to the hospital.

24. All personnel at a fire scene are expected to wear fire protective gear except paramedics on paramedic ambulances who are dispatched to perform medical services.

25. When responding to fire scenes, plaintiffs report to the incident commander or the incident commander's designee. The incident commander at a fire has the discretion to use dual function paramedics assigned to paramedic ambulances as the [sic] he deems necessary, but incident commanders normally do not use dual function paramedics to augment their firefighting personnel.

26. If there is an injury at the scene either to a firefighter or a member of the public, the paramedics on the paramedic ambulance are responsible for attending to such injuries.

27. If an incident commander were to use a dual function paramedic to augment his firefighting personnel, the ability to respond to medical emergencies would be significantly reduced because paramedics working alone are limited in the kind of medical activities they can perform.

28. If there is no injury and the incident commander does not see the need for the paramedic ambulance to stand by, the incident commander has the discretion to release the paramedic ambulance from the scene to be available to respond to other calls.

29. If there is no injury and the incident commander does not release the paramedics, the normal practice is for paramedics to set up a medical area in a staging area away from where the fire is being fought and to stand by in case of need for medical services.

30. Defendant produced no evidence that any plaintiff or any other dual function paramedic has ever been ordered to perform fire suppression by an incident commander.

31. Plaintiffs assigned to paramedic ambulances do not perform environmental rescues.

32. Environmental rescues are performed by fire suppression personnel assigned to resources which have the necessary equipment.

33. Plaintiffs assigned to paramedic ambulances are responsible for maintaining the paramedic ambulances and the medical equipment and supplies used on the paramedic ambulances.

34. Dual function paramedics do not maintain fire trucks and firefighters do not maintain paramedic ambulances.

35. Because paramedics are out of the fire station more frequently than firefighters, dual function paramedics miss many training opportunities required for firefighters.

36. For certain periods of time since September 9, 1996, which is the maximum statute of limitations period in this case, certain plaintiffs were assigned to work on fire trucks or fire engines. The parties agree that for these periods of time plaintiffs were legitimately classified as employees in fire protection under §207(k) of the FLSA and plaintiffs make no claims in this case for work performed during these periods.

37. The plaintiffs' primary job duties when assigned to rescue ambulances is to provide medical care at the various scenes to which they are dispatched.

38. Plaintiffs sometimes are dispatched and respond to crime scenes for the purpose of providing medical services to anyone who needs it.

39. Plaintiffs sometimes are dispatched and respond to vehicle accidents for the purpose of providing medical services to anyone who needs it.

40. When assigned to paramedic ambulances the plaintiffs respond to a greater number of purely medical emergencies then they do to fires, traffic accidents or crime scenes.

41. Dispatches to fire scenes make up a very small portion of plaintiffs' work.

42. Plaintiffs are not regularly dispatched to fire scenes.

43. Plaintiffs' activities are not an integral part of the Fire Department's fire protection activities.

44. Plaintiffs who are assigned to the Quality Improvement Section of the Fire Department do not respond

to calls for service and are engaged in non-manual work which is related solely to (para)medical matters and not fire suppression matters, but such personnel in unusual circumstances may be ordered to perform fire suppression functions or may volunteer to perform such functions.

45. Defendant produced no statistics regarding the frequency with which dual function paramedics perform work related to fire suppression.

46. Defendant produced no statistics comparing the amount of time dual function paramedics engage in work arguably related to fire suppression.

47. Defendant provided no evidence that dual function paramedic plaintiffs assigned to desk jobs had ever been ordered to perform fire suppression.

48. The City has not offered evidence showing how many times its employees or any of the plaintiffs have responded to fire scenes within a work period or the statute of limitations period. The City also has not offered evidence of the time in labor hours spent responding to fire calls by its employees or any of the plaintiffs.

49. The City has not produced any statistics showing what percentage of work time was spent by any employee of the Fire Department responding to any particular type of incident.

50. Some paramedic ambulances are not dispatched to any fire calls during an entire 27-day work period.

51. On September 19, 1985, Defendant sent a letter to United States Department of Labor ("DOL") asking whether paramedics were "eligible" for the 7(k) exemption."

52. The City did not provide DOL with any numerical or statistical information in connection with the inquiry.

53. On December 30, 1985, DOL responded to the inquiry of the City with respect to some of the questions asked, including the inquiry regarding the paramedics.

54. DOL's response stated: "Yes. As indicated in sections 553.3 and 553.8 of Part 553, paramedics are included in the term "fire protection activities" if such personnel form an integral part of the public agency's fire protection activity."

55. In response to another question posed by the City, DOL indicated that airport safety officers for the City could qualify for the 7(k) exemption provided the activities performed met the appropriate tests for inclusion as law enforcement and fire protection activity, and that activities which did not meet the tests did not exceed the 20% limitation for such activities set forth in the regulations.

56. On January 30, 1996, Assistant Los Angeles City Attorney Robert Cramer wrote the letter to William R. Bamattre Acting Chief Engineer and General Manager of the Fire Department which reviewed the law with respect to the 7(k) exemption.

57. Cramer's letter noted the Department of Labor Letter Ruling of February 13, 1995, and stated that the Letter Ruling "interprets the Labor Department regulations to allow the 7(k) exemption for EMS employees only if they are principally engaged as firefighters under the four tests set out in 29 C.F.R. § 553.210(a), which includes rescue and ambulance employees forming an integral part of a public agency's fire protection activities, and if any EMS functions they perform satisfy the tests set out in 29 C.F.R. § 553.215(a) for ambulance and rescue employees."

58. The letter also indicates that, in order to perform a complete analysis of the applicability of the 7(k) exemption to the City's EMS personnel, the City Attorney would need factual guidance. Cramer writes:

> At a minimum, we would need to know the organizational structure and assigned duties of your EMS personnel, whether such personnel have been trained in rescue techniques apart from emergency medical procedures, whether such personnel are regularly dispatched to the scenes of fires, traffic accidents, crimes, riots, and natural disasters, the percent of all EMS dispatches which involve such activities, the percent of EMS work time which is spent engaging in FLSA non-exempt activities."

59. The city provided no evidence that the above-reference factual information was ever produced and evaluated.

60. On September 14, 1998, the Court granted partial summary judgment in the case of *Acrich v. Los Angeles*, CV-97-4163 in favor of the single function paramedic plaintiffs, ruling that they do not come under the § 207(k) exception to the Fair Labor Standards Act.

61. The Court in *Acrich* ruled that to be entitled to the fire protection exemption, an employee must do fire protection in fact, not merely be hired by a fire department, and that the "80/20" test of the DOL regulations must be complied with whether or not the employee is a fire department employee.

62. The City did not take any action to change its treatment of plaintiffs after the decision in *Acrich* and continued to treat plaintiffs as exempt under the fire protection 207(k) threshold.

## CONCLUSIONS OF LAW

1. This Court has jurisdiction pursuant to 29 U.S.C. § 216(b) and 28 U.S.C. § 1337.

2. Defendant City of Los Angeles is an employer as defined by 29 U.S.C. § 203(d) and a public agency within 29 U.S.C. § 203(x).

3. Defendant is an enterprise as defined by 29 U.S.C. § 203(r).

4. Plaintiffs were each at all relevant times employed by defendant in an enterprise engaged in commerce or in the production of goods for commerce as defined by 29 U.S.C. §203(s).

5. Defendant is subject to the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 207(a) *et seq.* ("FLSA").

6. The Fair Labor Standards Act provides for the payment of premium overtime compensation at one and a half times the regular rate when an employee works more than 40 hours in a 7-day week. 29 U.S.C. § 207(a).

7. However, 29 U.S.C. § 207(k) provides an exception for law enforcement and fire protection employees. 29 U.S.C. § 207(k). Under this exemption, an employer must compensate law enforcement employees with premium overtime rates only after 165 hours of work in a 27 day period. For fire protection employees, the exemption provides that they receive premium rate overtime pay only after 204 hours of work in a 27 day period. *Id.*

8. Courts construe exemptions to the FLSA, narrowly. *A.H. Phillips, Inc. v.* Walling, 324 U.S. 490 (1945); *Vela v. City of Houston*, 276 F.3d 659, 666 (5th Cir. 2001) (hereinafter "*Vela*").

9. The employer claiming an exemption has the burden of showing that the employee is exempt from FLSA's general rules. *Gieg v. Howarth*, 244 F.3d 775, 776 (9th Cir. 2001).

10. In 1987, the Department of Labor issued regulations concerning the application of the FLSA to public employees. *See* 29 C.F.R. Part 553.

11. 29 C.F.R. § 553.210 creates a four part test for determining whether employees should be classified as fire protection employees;

    (a) As used in sections 7(k) and 13(b)(20) of the Act [29 U.S.C. §207(k)], the term "any employee . . . in fire protection activities" refers to any employee (1) who is employed by an organized fire department or fire protection district; (2) who has been trained to the extent required by State statute or local ordinance; (3) who has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental nonfirefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards. The term would include all such employees, regardless of their status as "trainee," "probationary," or "permanent," or of their particular specialty or job title (e.g., firefighter, engineer, hose or ladder operator, fire specialist, fire inspector, lieutenant, captain, inspector, fire marshal, battalion chief, deputy chief, or chief), such employees, regardless of their

> status as "trainee," "probationary," or "permanent," or of their particular specialty or job title (e.g. firefighter, engineer, hose or ladder operator, fire specialist, fire inspector, lieutenant, captain, inspector, fire marshal, battalion chief, deputy chief, or chief), and regardless of their assignment to support activities of the type described in paragraph (c) of this section,[1] whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity. The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See § 553.215.

12. Defendant has not met its burden of showing that Plaintiffs have the responsibility to engage in fire prevention, control or extinguishment. Therefore, their work fails to satisfy prong three of the four part test in 29 C.F.R. § 553.210.

13. Because the term "integral part" in the last sentence of § 553.210 is understood by reference to the two-part test in § 553.215, both tests must be satisfied to assert the exemption. *See Justice v. Metropolitan Government of Prosch*, 4 F.3d 1387, 1395 (6th Cir. 1993); *see also Vela at* 669-670.

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[1] Section C provides:

(c) Not included in the term "employee in fire protection activities" are the so-called "civilian" employees of a fire department, fire district, or forestry service who engage in such support activities as those performed by dispatchers, alarm operators, apparatus and equipment repair and maintenance workers, camp cooks, clerks, stenographers, etc.

14. Section 553.215 provides:

> "§ 553.215 Ambulance and rescue service employees.
>
> (a) Ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection or law enforcement activities of the type contemplated by sections 7(k) and 13(b)(20) if their services are substantially related to firefighting or law enforcement activities in that (1) the ambulance and rescue service employees have received training in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel injured in the performance of their respective, duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents. As provided in § 553.213(b), where employees perform both fire protection and law enforcement activities, the applicable standard is the one which applies to the activity in which the employee spends the majority of work time during the work period."

15. "Regularity" is not defined by any specific frequency, but rather must be determined by the facts of each case. *Vela* at 670 (citing Department of Labor Opinion Letter). The Fifth and Eleventh Circuits have adopted three factors for guiding a determination of regularity that examines the percentage of time spent in responding to § 553.215 emergencies; (1) the percentage of total calls that are dispatched to 553.215 emergencies, (2) the percentage of EMS man-hours spent responding to such dispatches, and (3) the percentage of

the total number of all calls involving 553.215 emergencies to which the EMS is dispatched. *Vela* at 23-24, citing *O'Neal v. Barrow County Bd. of Comm'rs*, 980 F.2d 674, 679 (11th Cir. 1993). This test provides guidance to this Court in interpreting the regularity requirement.

16. Defendant has not satisfied its burden of showing that Plaintiffs are regularly dispatched to fire scenes.

17. 29 C.F.R. § 553.212 provides:

> Employees engaged in fire protection or law enforcement activities as described in §§ 553.210 and 553.211, may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their fire protection or law enforcement activities. . . . The performance of such nonexempt work will not defeat [the section 7(k) exemption] unless it exceeds 20 percent of the total hours worked by that employee during the workweek or applicable work period.

18. Defendant has not satisfied its burden of showing that Plaintiffs non-exempt work is limited to less than 20% of the total hours worked in the applicable period.

19. Congress amended FLSA with 29 U.S.C. § 203(y), signed into law on December 9, 1999, which provides:

> § 203. Definitions
>
> As used in this Act –
>
> . . . (y) "Employee in fire protection activities" means an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who –
>
> (1) is trained in fire suppression, has the legal authority and responsibility to engage in fire

suppression, and is employed by a fire department of a municipality, county, fire district, or State; and

(2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

20. When assigned to paramedic ambulances, dual function paramedics do not have the responsibility to engage in fire suppression. Therefore, the enactment of 203(y) did not make dual function employees on paramedic ambulances eligible for the 207(k) exemption.

21. Those Plaintiffs who have held "desk job" positions as Quality Improvement Analysts are not "regularly dispatched" to fire scenes, and do not meet the § 203(y) requirement that they engage in the "prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk," nor do they have the responsibility to engage in fire suppression. Therefore, they do not fall within the 207(k) exemption.

22. Thus, Plaintiffs succeed on their claim that they do not fall under the firefighter exemption found in 29 U.S.C. § 207(k) under FLSA either before or after the enactment of 29 U.S.C. § 203(y).

23. CFR 553.213(b) provides:

Section 553.213 Public agency employees engaged in both fire protection and law enforcement activities.

(b) As specified in § 553.230, the maximum hours standards under section 7(k) are different for employees engaged in fire protection and for employees engaged in law enforcement. For those employees who perform both fire protection and

law enforcement activities, the applicable standard is the one which applies to the activity in which the employee spends the majority of work time during the work period.

24. In order to fall within the law enforcement exemption, Plaintiffs' activities must be an "integral part" of the agency's law enforcement activities. 29 C.F.R. § 533.211. The CFR defines law enforcement activities as follows:

> § 553.211 Law enforcement activities.
>
> (a) As used in sections 7(k) and 13(b)(20) of the Act, the term "any employee in law enforcement activities" refers to any employee (1) who is a uniformed or plainclothed member of a body of officers and subordinates who are empowered by State statute or local ordinance to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes, (2) who has the power to arrest, and (3) who is presently undergoing or has undergone or will undergo on-the-job training and/or a course of instruction and study which typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid and ethics.
>
> (b) Employees who meet these tests are considered to be engaged in law enforcement activities regardless of their rank, or of their status as "trainee," "probationary," or "permanent," and regardless of their assignment to duties incidental to the performance of their law enforcement activities such as

equipment maintenance, and lecturing, or to support activities of the type described in paragraph (g) of this section, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity. The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's law enforcement activities. See § 553.215.

(c) Employees who do not meet each of the three tests described above are not engaged in "law enforcement activities" as that term is used in sections 7(k) and 13(b)(20).

25. Plaintiffs do not qualify for the law enforcement exemption, because they neither meet the three tests above nor do their activities form an integral part of a law enforcement agency. In addition, neither party presented evidence sufficient for the Court to conclude that Plaintiffs activities satisfy the 80/20 rule for law enforcement under 553.212(a).

26. "No employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay . . . overtime compensation under the Fair Labor Standards Act of 1938 . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval or interpretation of [the Administrator of the Wage and Hour Division of the Department of Labor] . . . , or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval,

interpretation, practice or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect." 29 U.S.C. § 259.

27. An employer must establish three elements to rely on this defense: (1) that its action was taken in reliance on a ruling of the Administrator, (2) that it was in conformity with that ruling, (3) that it was in good faith. *EEOC v. Home Insurance*, 672 F.2d 252, 263 (2d Cir. 1982); *Cole v. Farmfresh Poultry*, 824 F.2d 923, 926 (11th Cir. 1987).

28. The ruling must specifically address the particular circumstances, and not leave interpretation of compliance to the employer. *Home Insurance*, 672 F.2d at 265. If the letter merely mimics statutory language it provides no guidance. *Id.* at 264-265. *See also Horan v. King County*, 740 F.Supp. 1471, 1480-81 (D.C. W.D. Wash. 1990) ("clear answer to . . . particular situation" required).

29. In this case, the City relies on a 1985 question it posed to the Department of Labor regarding whether its paramedics properly fall under the firefighter's exemption. The letter ruling on which Defendant relies responds to the City's question: "Are the paramedics eligible for the alterative overtime pay exception under section 7(k)?" The Wage and Hour Division's response is "Yes. As indicated in sections 553.3 and 553.8 of Part 553, paramedics are included in the term 'fire protection activities' if such personnel form an integral part of the public agency's fire protection activities." Although the answer starts "yes," it refers the City back to the statutory sections without providing firm guidance on what constitutes an "integral part" of the agency's fire protection activities. For that reason, the City cannot rely on the letter ruling.

30. At least as early as January 30, 1996, the City was on notice that the applicability of the 207(k) exemption

to cross trained paramedics was in question; an employer may not rely on an interpretation after it has been changed, modified, or called into question. 29 C.F.R. § 790.15(b) (requiring an objective test of the reasonably prudent person for the § 259 exemption).

31. The City does not have a defense to this action under 29 U.S.C. § 259.

32. 29 U.S.C. § 216(b) provides that an employer who violates Section 207 of FLSA "shall be liable to the employee or employees affected in the amount of their unpaid . . . overtime compensation . . . and in an additional equal amount as liquidated damages."

33. Under 29 U.S.C. § 260, the Court has discretion to waive liquidated damages where it finds good faith:

> § 260. Liquidated damages
>
> . . . [I]f the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16 of such Act [29 USCS § 216].

34. If the Defendant is found liable and fail [sic] to show good faith and reasonableness, liquidated damages are mandatory. *Local 246 v. Southern California Edison*, 83 F.3d 292, 297 (9th Cir. 1996).

35. Defendant did not act reasonably and in good faith; therefore, liquidated damages apply.

36. The applicable statute of limitations for this action is two years unless the cause of action arises from a willful violation of the statute. 29 U.S.C. § 255.

37. A violation of the Act is willful if "employer either knew or showed reckless disregard as to whether its conduct was prohibited by the statute." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988).

38. Defendant cannot be found to have willfully violated FLSA by failing to apply the law enforcement threshold to Plaintiffs because Plaintiffs' activities do not meet the regulatory definition for law enforcement in 29 C.F.R. § 553.211. Moreover, Plaintiffs did not provide sufficient evidence for the Court to conclude that their activities satisfy the 80/20 rule for law enforcement under 553.212(a).

39. Plaintiffs do not seek a three year statute of limitations on their claim that they are properly 40 hour-a-week employees.

40. Any Findings of Fact which would be more appropriately Conclusions of Law shall be considered to be such conclusions. Any Conclusions of Law which would be more appropriately considered to be Findings of Fact, shall be considered such findings.

SO ORDERED.

DATE: July 3, 2002

/s/ Consuelo B. Marshall
CONSUELO B. MARSHALL
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT**
**FOR THE CENTRAL DISTRICT OF CALIFORNIA**

| | |
|---|---|
| **CEDRICK CLEVELAND, et al.,** Plaintiffs, v. **CITY OF LOS ANGELES, etc.,** Defendants. | **Case No.** CV 99-9175 CBM **Judgment** (Filed Feb. 21, 2003) |

This action came on for trial before the Court, Honorable Consuelo B. Marshall, United Stats District Judge, presiding, and the issues having been duly tried and findings and conclusions having been duly rendered,

IT IS ORDERED AND ADJUDGED that the plaintiffs recover of the defendant back wages and liquidated damages in the amounts set forth in the following schedule:

| **Plaintiff** | | **Back Wages** | **Liquidated Damages** |
|---|---|---|---|
| 1. | Achan, Juan M. | $ 33,877.43 | $ 33,877.43 |
| 2. | Aldana, Luis F. | $ 18,176.88 | $ 18,176.88 |
| 3. | Archie, Dennis M. | $ 40,931.05 | $ 40,931.05 |
| 4. | Arnado, Anthony R. | $ 30,523.37 | $ 30,523.37 |
| 5. | Barnes, Dennis W. | $ 5,723.31 | $ 5,723.31 |
| 6. | Boscoe, Jennifer L. | $ 3,922.96 | $ 3,922.96 |
| 7. | Braff, Jason A. | $ 17,769.65 | $ 17,769.65 |
| 8. | Brooks, Brian T. | $ 29,524.39 | $ 29,524.39 |
| 9. | Brown, Jaime L. | $ 30,282.57 | $ 30,282.57 |

| | | | |
|---|---|---|---|
| 10. | Brown, Michael E. | $ 17,515.50 | $ 17,515.50 |
| 11. | Burton, Joshua L. | $ 1,166.88 | $ 1,166.88 |
| 12. | Carpenter, Christopher L. | $ 27,978.32 | $ 27,978.32 |
| 13. | Carranza, Armando | $ 40,973.48 | $ 40,973.48 |
| 14. | Chang, Heywood | $ 20,073.59 | $ 20,073.59 |
| 15. | Clark, Braxton | $ 8,930.78 | $ 8,930.78 |
| 16. | Clark, Paul | $ 7,696.23 | $ 7,696.23 |
| 17. | Cleveland, Cedrick L. | $ 44,567.93 | $ 44,567.93 |
| 18. | Cole, Ruel A. | $ 11,214.63 | $ 11,214.63 |
| 19. | Colson, Juan R. | $ 44,623.30 | $ 44,623.30 |
| 20. | Crawford, Raymond R. | $ 15,431.14 | $ 15,431.14 |
| 21. | Crites, James D. | $ 23,645.49 | $ 23,645.49 |
| 22. | Cuevas, Armando C. | $ 35,949.49 | $ 35,949.49 |
| 23. | Dilks, Douglas R. | $ 16,777.10 | $ 16,777.10 |
| 24. | Dodd, Jeffrey M. | $ 42,760.41 | $ 42,760.41 |
| 25. | Dragotto, Daniel S. | $ 22,510.18 | $ 22,510.18 |
| 26. | Dudley, Brian C. | $ 42,955.88 | $ 42,955.88 |
| 27. | Dunn, William M. | $ 478.77 | $ 478.77 |
| 28. | Encinias, Steve J. | $ 17,058.22 | $ 17,058.22 |
| 29. | Ferro, Anthony C. | $ 6,912.92 | $ 6,912.92 |
| 30. | Flores, Guadalupe G. | $ 14,276.03 | $ 14,276.03 |
| 31. | Flot, Mark W. | $ 15,210.47 | $ 15,210.47 |
| 32. | Ford, Larry R. | $ 39,082.42 | $ 39,082.42 |
| 33. | Freeman, Timothy | $ 19,612.18 | $ 19,612.18 |
| 34. | Gallegos, Raymond A. | $ 1,059.75 | $ 1,059.75 |
| 35. | Garrett, Danny W. | $ 28,270.15 | $ 28,270.15 |

| | | | |
|---|---|---|---|
| 36. | Gibson, James D. | $ 12,515.07 | $ 12,515.07 |
| 37. | Glenchur, Mark L. | $ 15,094.90 | $ 15,094.90 |
| 38. | Goldsworthy, James R. | $ 17,541.61 | $ 17,541.61 |
| 39. | Gonzalez, Jeffrey G. | $ 18,895.67 | $ 18,895.67 |
| 40. | Granucci, Cristian P. | $ 13,617.87 | $ 13,617.87 |
| 41. | Guttierrez, Edward J. | $ 19,521.13 | $ 19,521.13 |
| 42. | Guzman, Benjamin R. | $ 17,830.19 | $ 17,830.19 |
| 43. | Guzman, Joel | $ 16,560.83 | $ 16,560.83 |
| 44. | Habersham, Sir R. | $ 38,111.11 | $ 38,111.11 |
| 45. | Hardaway, Anthony W. | $ 38,136.42 | $ 38,136.42 |
| 46. | Herman, Huston S. | $ 38,781.75 | $ 38,781.75 |
| 47. | Hernandez, Alfred B. | $ 16,765.60 | $ 16,765.60 |
| 48. | Herrera, Rene H. | $ 26,336.93 | $ 26,336.93 |
| 49. | Herrera, Ricky M. | $ 26,803.98 | $ 26,803.98 |
| 50. | Hoerner, Larry V. | $ 24,795.29 | $ 24,795.29 |
| 51. | Jackson, Kory W. | $ 38,761.85 | $ 38,761.85 |
| 52. | Jackson, Lawrence M. | $ 4,814.05 | $ 4,814.05 |
| 53. | Jackson, Roderic A. | $ 8,549.58 | $ 8,549.58 |
| 54. | Jimenez, Ronnie R. | $ 17,304.17 | $ 17,304.17 |
| 55. | Johnson, Jayson A. | $ 17,928.37 | $ 17,928.37 |
| 56. | Johnson, Keith M. | $ 29,566.33 | $ 29,566.33 |
| 57. | Johnson, Kevin M. | $ 17,336.61 | $ 17,336.61 |
| 58. | Jones, Donald R. | $ 36,892.35 | $ 36,892.35 |
| 59. | Karaoglanian, Garabed | $ 10,474.08 | $ 10,474.08 |
| 60. | Knighten, Kenneth L. | $ 39,478.03 | $ 39,478.03 |
| 61. | Lankau, Joseph P. | $ 27,312.79 | $ 27,312.79 |

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| 62. | Lecesne, Dale A. | $ 28,581.06 | $ 28,581.06 |
| 63. | Ledesman, Roberto J. | $ 33,338.24 | $ 33,338.24 |
| 64. | Lee, Brian M. | $ 6,188.87 | $ 6,188.87 |
| 65. | MacInnes, Robert W. | $ 24,604.69 | $ 24,604.69 |
| 66. | Malafronte, David J. | $ 9,172.87 | $ 9,172.87 |
| 67. | Manzo, Joe G. | $ 26,194.06 | $ 26,194.06 |
| 68. | McDaniel, Dexter G. | $ 34,509.53 | $ 34,509.53 |
| 69. | McKee, Michele M. | $ 8,547.47 | $ 8,547.47 |
| 70. | McKee, Timothy K. | $ 29,439.61 | $ 29,439.61 |
| 71. | Meade, Laurinda K. | $ 33,341.79 | $ 33,341.79 |
| 72. | Menton, Joseph M. | $ 10,782.75 | $ 10,782.75 |
| 73. | Moffatt, Christopher J. | $ 15,286.58 | $ 15,286.58 |
| 74. | Montgomery, Donta T. | $ 31,816.63 | $ 31,816.63 |
| 75. | Morris, Cecil D. | $ 17,443.83 | $ 17,443.83 |
| 76. | Morris, Roger D. | $ 17,975.85 | $ 17,975.85 |
| 77. | Moskovitz, Carl S. | $ 11,714.08 | $ 11,714.08 |
| 78. | Mungaray, Aaron G. | $ 17,305.76 | $ 17,305.76 |
| 79. | Naeole, Alan C. | $ 18,989.67 | $ 18,989.67 |
| 80. | Nash, Donald P. | $ 13,699.52 | $ 13,699.52 |
| 81. | Nordquist, James E. | $ 16,347.60 | $ 16,347.60 |
| 82. | O'Shea, Tyrone P. | $ 32,256.62 | $ 32,256.62 |
| 83. | Ohligshlage, Dennis A. | $ 20,732.13 | $ 20,732.13 |
| 84. | Oliphant, Drew | $ 15,355.49 | $ 15,355.49 |
| 85. | Oyama, Patrick T. | $ 34,306.01 | $ 34,306.01 |
| 86. | Paige, Roy A. | $ 32,874.63 | $ 32,874.63 |
| 87. | Pass, David E. | $ 24,462.35 | $ 24,462.35 |

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| 88. | Pate, Norman M. | $ 5,665.92 | $ 5,665.92 |
| 89. | Phillips, Steven K. | $ 11,895.86 | $ 11,895.86 |
| 90. | Pilato, Brandi A. | $ 25,224.33 | $ 25,224.33 |
| 91. | Ramsey, William E. | $ 45,013.83 | $ 45,013.83 |
| 92. | Ravitz, Steven G. | $ 2,516.73 | $ 2,516.73 |
| 93. | Richard, Louis D. | $ 36,556.60 | $ 36,556.60 |
| 94. | Riles, David T. | $ 44,041.99 | $ 44,041.99 |
| 95. | Rodriguez, John A. | $ 41,336.39 | $ 41,336.39 |
| 96. | Rousseau, Mark F. | $ 26,631.03 | $ 26,631.03 |
| 97. | Ruff, Brent M. | $ 15,037.54 | $ 15,037.54 |
| 98. | Saffo, Shannon K. | $ 17,994.25 | $ 17,994.25 |
| 99. | Semerjian, Paul | $ 19,940.90 | $ 19,940.90 |
| 100. | Senneff, Richard D. | $ 37,159.95 | $ 37,159.95 |
| 101. | Smith, George C. | $ 12,142.94 | $ 12,142.94 |
| 102. | Smith, Stanley E. | $ 7,355.50 | $ 7,355.50 |
| 103. | Sorum, Paul E. | $ 5,692.08 | $ 5,692.08 |
| 104. | Spankroy, Brent A. | $ 9,332.08 | $ 9,332.08 |
| 105. | St. Georges, Joseph M. | $ 26,015.69 | $ 26,015.69 |
| 106. | Stafford, Thomas W. | $ 26,432.36 | $ 26,432.36 |
| 107. | Steiner, Carey R. | $ 18,008.26 | $ 18,008.26 |
| 108. | Stone, Dennis C. | $ 13,652.72 | $ 13,652.72 |
| 109. | Taylor, Michael J. | $ 14,760.98 | $ 14,760.98 |
| 110. | Tobey, Michael D. | $ 10,712.90 | $ 10,712.90 |
| 111. | Torres, Abel J. | $ 27,465.69 | $ 27,465.69 |
| 112. | Torres, Louis | $ 25,794.83 | $ 25,794.83 |
| 113. | Utterback, Catherine A. | $ 4,821.50 | $ 4,821.50 |

| | | |
|---|---|---|
| 114. Vigil, John P. | $ 22,550.42 | $ 22,550.42 |
| 115. Villa, Victor M. | $ 14,455.45 | $ 14,455.45 |
| 116. Wible, Donnel C. | $ 2,936.25 | $ 2,936.25 |
| 117. Wigchert, Kenneth F. | $ 21,224.52 | $ 21,224.52 |
| 118. Williams, Erik D. | $ 39,448.46 | $ 39,448.46 |
| 119. Woolf, Mark R. | $ 1,481.96 | $ 1,481.96 |
| **Totals:** | **$ 2,565,757.01** | **$ 2,565,757.01** |

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs recover of defendant $116,550 in attorneys' fees and $11,389.12 in expenses.

DATED: 2/21/03

/s/ Consuelo B. Marshall
HON. CONSUELO B. MARSHALL
*United States District Judge*

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

| | |
|---|---|
| CEDRICK CLEVELAND, et al., Plaintiffs-Appellees, v. CITY OF LOS ANGELES, a Municipal corporation, Defendant-Appellant. | No. 03-55505<br>D.C. No. CV-99-09175-CBM<br>(Filed Oct. 4, 2005) |

Before: BROWNING, PREGERSON, and BERZON, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny appellant's petition for rehearing. Judges Pregerson and Berzon voted to deny the petition for rehearing en banc, and Judge Browning has recommended the denial of that petition.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested en banc rehearing. See Fed. R. App. P. 35(b).

The petition for rehearing and for rehearing en banc are DENIED.

No. 05-851

Supreme Court, U.S.
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OFFICE OF THE CLERK

In The
# Supreme Court of the United States

CITY OF LOS ANGELES,

*Petitioner,*

vs.

CEDRICK CLEVELAND, et al.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Did the district court and court of appeals correctly hold that, based on the factual record created at trial, plaintiffs did not have the "responsibility to engage in fire suppression" within the meaning of 29 U.S.C. § 203(y) (2000), and therefore were not exempt from overtime pay for hours worked in excess of 40 hours per week under 29 U.S.C. § 207(k) (2000)?

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## STATEMENT OF THE CASE

### A. Prior proceedings

This is a case under the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 207 (2000) ("FLSA"). Plaintiffs work as paramedics at the Los Angeles City Fire Department ("City"). They are also "cross-trained" as firefighters, but at all relevant times have worked on ambulances, providing paramedical services exclusively. They did not fight fires. They were not expected to do so and there was no real chance that they would fight fires. The City treated plaintiffs as "employee[s] in fire protection" under 29 U.S.C. § 207(k) (2000), paying them overtime wages for hours worked in excess of 204 in a 27-day work period. Section 207(k) is a "partial exemption" to the regular FLSA rule requiring overtime pay for hours worked over 40 in a seven-day work week. 29 U.S.C. § 207(a) (2000). Plaintiffs claim they were not "employee[s] in fire protection" when they worked as paramedics on ambulances, and should have been paid overtime for hours worked in excess of 40 per work week.

Following a bench trial, the district court issued findings of fact and conclusions of law and ruled the City had not met its burden of proving that plaintiffs were exempt under the section 207(k) exemption. The district court awarded plaintiffs back pay, liquidated damages, attorney's fees and costs. The parties stipulated to these amounts and judgment was entered for plaintiffs. The City appealed, and the Ninth Circuit affirmed. 420 F.3d 981 (9th Cir. 2005)

In December, 1999, after the filing of this case but before trial, Congress added a new section to the FLSA, 29 U.S.C. § 203(y) (2000). Section 203(y) defines the phrase "employee in fire protection activities" used in section 207(k). Before the enactment of section 203(y), the phrase was defined by United States Department of Labor ("DOL") regulations. In its conclusions of law, the district court ruled that the City had not met its burden of proving that plaintiffs were properly exempt under section 207(k) as employees "in fire protection activities" either under the definitions in DOL regulations or under the definition in section 203(y). In its appeal to the court of appeals, the City abandoned all arguments except those based on the definition of "employee in fire protection activities" in section 203(y). The City argued that the district court erred in holding that plaintiffs were not exempt under section 203(y), and also argued that section 203(y) controlled this case in its entirety, including during the period before its enactment. The court of appeals upheld the district court's conclusion that, based on the facts, plaintiffs were not exempt under section 203(y) because plaintiffs did not have the "responsibility to engage in fire suppression" as required by section 203(y)(1).

**B. Facts**

On appeal, the City did not challenge any of the district court's findings of fact. In its petition, the City ignores most of these findings. The trial record amply supports the district court's finding that plaintiffs did not have the responsibility to engage in fire suppression.

Plaintiffs are "cross-trained" paramedics for the City of Los Angeles Fire Department. (19).[1] This means they are trained and certified in fire suppression skills and also trained and certified as advanced life support paramedics. (19). The City also employs paramedics who are not cross-trained in fire suppression. (19).

During the times pertinent to this case, plaintiffs worked on "paramedic ambulances" as paramedics. (20, 46). Ambulances are almost always staffed by two paramedics. These may be cross-trained paramedics, paramedics who are not cross-trained, or one of each. (20). The cross-trained paramedics do the "exact same job" as their colleagues who are not cross-trained, which is to provide medical care and transport patients to hospitals, maintain the ambulance, and do related paperwork. (20-22, 50-51, 54, 75, 90, 135, 142, 185).[2] Paramedics who are not cross-trained are paid overtime for hours worked over 40 in a workweek for performing this work on paramedic ambulances. Plaintiffs are not. (25, 92).

Paramedic ambulances are sent to calls by dispatchers when there may be a need for advanced life support medical services. (20, 21, 52, 75-76, 135). They are not dispatched for a firefighting function. (21, 52, 57, 75-76, 90-91, 135). Which particular ambulance gets sent to a call is a function solely of availability and location; whether

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[1] References are to pages of Appellant's Excerpts of Record submitted to the court of appeals by the City, and include, but are not limited to, references to the district court's findings of fact. References to numbers preceded by "S" are to the Appellees' Supplemental Excerpts of Record submitted by plaintiffs.

[2] Cross-trained paramedics are supposed to wear a different colored helmet than single function paramedics. (67-68).

the paramedics staffing an ambulance are cross-trained plays no part. (20). The dispatchers do not know the training of the paramedics on the paramedic ambulances, and the paramedic ambulances are not dispatched according to whether the employees staffing the ambulance are cross-trained as firefighters or not. (57-58). Since they are dispatched to the scene solely to provide medical services if needed, whether paramedics staffing the paramedic ambulance are cross-trained is irrelevant to the dispatcher, regardless of the nature of the call. (21, 97, 151).

Paramedic ambulances have no firefighting function and are not designated by the City as fire suppression resources. (48-49, 180). They carry no firefighting equipment other than a small fire extinguisher. (134). Ambulances carry no water and are not capable of pumping water to extinguish fires. (48-49, 134). They carry no hoses or ladders or specialized extrication equipment. (7, 20, 134). Paramedic ambulances do not carry any breathing apparatus (tanks of air worn in hazardous environments). (20, 59).

The Fire Department maintains a variety of other vehicles which, unlike the ambulances, are used for fire suppression. (47-48). Unlike ambulances, these vehicles have direct firefighting functions, including the ability to carry and pump water. They carry a full standard complement of firefighting equipment and rescue tools, including breathing apparatus to allow the personnel staffing them to enter hazardous environments. (48, 60, 138). The standard staffing of some of these fire vehicles includes one or two cross-trained paramedics. (47-48). Unlike ambulances, when these fire suppression vehicles are dispatched, the cross-trained paramedics assigned to them

"can be expected to perform either firefighting or paramedic services as needed." (138).

Virtually all of plaintiffs' working time is spent at incidents other than fires. Dispatch to fires is rare, and when it occurs the purpose is to provide medical services. Except in certain larger structure fires (when established protocol requires automatic dispatch of a paramedic ambulance to a fire scene to stand by in case of medical emergency), plaintiffs on paramedic ambulances are dispatched to fire scenes only when there is a report of a person who may be trapped, injured, or in need of medical attention or when the incident commander requests the dispatch of a paramedic ambulance to stand by in case of injury or loss of life. (54, 137-38). Plaintiffs are sometimes dispatched and respond to crime scenes and vehicle accidents for the purpose of providing medical services to anyone who needs it. (22, 23). However, the clear majority of calls to which plaintiffs are dispatched are medical calls having nothing to do with fires, crimes, or accidents. (51, 53, 54, 89, 142, S8).

Upon the rare dispatch to a fire scene, plaintiffs are required to place their ambulances in locations that do not impede the operation of firefighting equipment and do not impede plaintiffs' ability to leave the scene to transport patients or go to another call if there is no need for medical services at the fire scene. (56, 76). If there is an injury at the scene either to a firefighter or member of the public, plaintiffs are responsible for attending to it. (21). If there is no injury to attend to, plaintiffs stand by in a medical staging area away from the area where the fire is being fought or may be released from the scene by the incident

commander to be available to respond to other calls. (21-22, 56, 90).

Incident commanders at fire scenes do not normally view plaintiffs on paramedic ambulances as augmenting their firefighting personnel. (21, 185). There is no evidence in the record that any plaintiff – or any cross-trained paramedic assigned to an ambulance – was ever ordered to perform any fire suppression activity while working on a paramedic ambulance. (22, 57, 77, 91, 96). Using a cross-trained paramedic assigned to an ambulance to perform fire suppression would compromise the ability of the remaining paramedic to perform medical functions because paramedics working alone are limited by medical protocols in the kind of medical activities they can perform. (21, 63, 151-152, 185).

Firefighters are required to wear "personal protective equipment" or "turn out gear" when performing fire suppression work. (60, 206-207). All personnel at a fire scene are required to wear fire protective gear except paramedics on paramedic ambulances, who are not required to do so because they are standing by to provide medical care, which does not place them in an environment where such apparatus is needed. (21, 60).

Cross-trained paramedics assigned to paramedic ambulances may volunteer, if they choose, to assist firefighters at a fire scene in activities such as pulling hose off trucks and "throwing ladders. (125-126, 193-194 ). Paramedics who are not cross-trained may also volunteer to perform these same tasks. (184). There is no evidence in the record that any plaintiff ever engaged in such activities. (57, 77, 91). While Deputy Chief Neamy testified for the City that at a fire scene he would "expect" plaintiffs on